Arbitration CAS ad hoc Division (OG Beijing) 22/008 & 22/009 & 22/010 International Olympic Committee (IOC) & World Anti-Doping Agency (WADA) & International Skating Union (ISU) v. Russian Anti-Doping Agency (RUSADA) & Kamila Valieva & Russian Olympic Committee (ROC), award of 17 February 2022 (operative part of 14 February 2022)

Panel: Mr Fabio Iudica (Italy), President; Mr Jeffrey Benz (USA); Judge Vesna Bergant Rakočević (Slovenia)

Skating (figure skating)
Lifting of a provisional suspension imposed on an athlete for doping
Jurisdiction ratione materiae of the CAS ad hoc Division
Jurisdiction ratione temporis of the CAS ad hoc Division
Protected Person
Mandatory provisional suspension for Protected Persons
Filling of a lacuna in the World Anti-Doping Code
Treatment of provisional suspensions for Protected Persons as optional provisional suspensions
Irreparable harm
Delay in the process of samples

1. **The CAS ad hoc Division has jurisdiction over disputes envisaged under Article 61(2) of the Olympic Charter, i.e. dispute *"arising on the occasion or in connection with the Olympic Games"* which means that attention should be paid to the dispute and what the dispute is about. Therefore, even if an alleged anti-doping violation has not been committed on the occasion or in connection with the Olympic Games and the provisional suspension imposed as a result of the alleged anti-doping violation does not specifically target the Olympic Games, the dispute might nevertheless be directly connected with the Olympic Games if the dispute is about whether or not the decision to lift such provisional suspension should be confirmed and the outcome of the dispute is relevant for the athlete's further participation in the Olympic Games.**

2. **If the decision which gave rise to the dispute was rendered during the period considered to be relevant under Article 1 of the CAS Ad Hoc Rules, the CAS ad hoc Division has jurisdiction *ratione temporis* over the dispute. In this respect, it is irrelevant whether the initial facts at the basis of the dispute may have arisen at a previous stage.**

3. **The World Anti-Doping Code (WADC) 2021 intends to treat Protected Persons differently than other Athletes or Persons in certain circumstances based on the understanding that, below a certain age or intellectual capacity, an Athlete or other Person may not possess the mental capacity to understand and appreciate the prohibitions against conduct contained in the Code.**

4. **The WADC does not provide an exemption to a mandatory Provisional Suspension for**

a non-specified substance used by a Protected Person even though the ultimate sanction range for the Protected Person is the same as for other categories of athletes who can avoid a mandatory Provisional Suspension. Put differently, a Protected Person is subject to the same ultimate sanction as other athletes who avoid a mandatory Provisional Suspension. But only Protected Persons can potentially receive a public reprimand and no period of ineligibility and yet be subject to a mandatory Provisional Suspension preventing them from competing for months while their case is being handled. This different and harsher treatment for Protected Persons is inconsistent with the oft-expressed intent of the Code drafters to make the Code apply more leniently and flexibly to Protected Persons in light of their age and inexperience, and their diminished responsibility for rule violations. Exempting older athletes from mandatory Provisional Suspensions in most instances in which they might ultimately be able to establish basis for a short sanction or reprimand but not exempting younger, legally incapable, and immature Protected Persons who might be entitled to a short sanction or reprimand appears clearly to be an unintended gap in the Code.

5. **When CAS panels find a *lacuna,* or a gap, in the WADC, this has been the basis for a CAS panel to find a gap filling construct that would ameliorate an overly harsh or inconsistent outcome applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based. This is an exercise in interpretation, not in rewriting rules or making policies that are better made by sporting bodies exercising proper governance.**

6. **In cases involving Protected Persons, Provisional Suspensions should be evaluated as optional Provisional Suspensions under the WADC 2021 and its progeny.**

7. **While it is not in itself sufficient that an athlete is prevented from competing in sports events to justify a stay in itself, given the finite and brief career of most athletes, a suspension (subsequently found to be unjustified) can cause irreparable harm, especially when it bars the athlete from participating in a major sports event.**

8. **While athletes are held to a high standard in meeting their anti-doping obligations, at the same time, the anti-doping authorities are subject to mere recommendations on time deadlines that are designed to protect athletes from late- or inconveniently-arising claims. The flexibility of the recommendations and guidelines applicable to WADA-accredited labs contrasts with the stringency of the rules on Provisional Suspensions. Although all athletes' samples are anonymous, it should be possible for anti-doping laboratories and authorities to handle anti-doping tests in a swift manner when the samples are collected at significant pre-events that may constitute selection events for the Olympic Games.**

I. PARTIES

A. The Applicants

1. The First Applicant is the International Olympic Committee ("IOC"), the governing body of the Olympic Games and the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, including the Olympic Winter Games in Beijing in 2022 ("OWG 2022") fulfilling the mission, role and responsibilities assigned by the Olympic Charter.

2. The Second Applicant is the World Anti-Doping Agency ("WADA") which is a private law foundation constituted under Swiss law in 1999 to promote and coordinate at the international level the fight against doping in sport. WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

3. The Third Applicant is the International Skating Union ("ISU"), the international sport federation administering Ice Skating disciplines worldwide, recognised as such by the IOC, has its registered seat and its headquarters in Lausanne, Switzerland.

B. The Respondents

4. The First Respondent is the Russian Anti-Doping Agency ("RUSADA"), having its headquarters in Moscow, Russia. It is the anti-doping organisation which is in charge of the implementation and the application of the World Anti-Doping Code ("WADC") and the fight against doping at national level.

5. The Second Respondent is Kamila Valieva, a Russian professional figure skater, born in Kazan, Russia, on 26 April 2006 (the "Athlete" or "Ms Valieva"). She is a member of the ROC delegation at the OWG 2022 and she is registered to compete in the upcoming event of Women's Single Skating in the sport of figure skating on 15 February 2022.

6. The Third Respondent is the Russian Olympic Committee ("ROC"), the national Olympic committee for Russia recognised as such by the IOC, which manages and promotes the Olympic Movement in Russia. The ROC has its registered seat in and its headquarters in Moscow, Russia.

II. INTRODUCTION

7. This arbitration is brought pursuant to the Applications respectively filed by each of IOC, WADA and ISU, in relation to the Decision N° 40/2022 of the RUSADA Disciplinary Anti-Doping Committee (the "DADC"), on 9 February 2022, to lift a provisional suspension that had been imposed on the Athlete on 8 February 2022 (the "Appealed Decision").

III. FACTS

A. Background Facts

8. The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the Parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

9. The Athlete is a 15-year-old Russian figure skater, competing in the OWG 2022 as a member of the ROC delegation.

10. On 25 December 2021, on the occasion of her participation in the 2022 Russian National Figure Skating Championships, which took place in Saint Petersburg from 21 December until 26 December 2021, the Athlete was subjected to an in-competition doping control test and provided a urine sample (the "Sample"). The anti-doping authority which conducted the testing was RUSADA. On her Doping Control Form, the Athlete disclosed that she was taking three substances, two of which were legible (l-carnitine and hypoxen).

11. In the documentation in the file, until 7 February 2022, no further communication or information is found concerning the results of the collected Sample.

12. On 7 February 2022, the Athlete competed in the Team Event – Women's Single Skating – Free Skating at the OWG 2022 as a member of the ROC team which placed first.

13. Also on 7 February 2022, based on the information contained in the relevant Test Report, the Doping Control Laboratory of the Karolinska University Hospital in Stockholm, Sweden, a WADA-accredited laboratory (the "Doping Control Laboratory"), issued an Adverse Analytical Finding ("AAF") for the presence of *"S4. Hormone and Metabolic Modulators/trimetazidine"* in the Athlete's Sample, which is a Non-Specified Substance. The AAF included the following details concerning the finding: *"Neither lomerizine nor its metabolite M6 were detected in the Sample"*. According to the Test Report, the Sample was received by the Doping Control Laboratory on 29 December 2021. It was explained that the delay in providing results sooner arose from the fact that the laboratory had personnel shortages as a result the COVID-19 pandemic.

14. The concentration of Trimetazidine detected was estimated at 2.1 ng/mL.

15. On 8 February 2022, Ms Valeriya German, Head of the Results Management Department at RUSADA, notified the Athlete, WADA, ITA and ISU that the Results Management Process had been initiated due to a potential anti-doping rule violation under clauses 4.1 and 4.2 of the All-Russian Anti-Doping Rules (the "Russian ADR") on the basis of the Athletes' AAF and that the Athlete had been provisionally suspended as of the same day at 11.36 Beijing time pursuant to art. 9.4.1 of the Russian ADR and to Article 7.4.1 of the WADA Code (the "Provisional Suspension").

16. Also on the same date, the ITA notified the Athlete of the implementation of her Provisional Suspension imposed by RUSADA. The notification, which was also forwarded by e-mail to the IOC, WADA, RUSADA and ISU, stated as follows:

> *"We write to you on behalf of the International Olympic Committee (the "IOC") insofar as the IOC has delegated some of its responsibilities related to the implementation of the Doping Control in relation to the Games of the XXIV Olympic Winter Games (the "Olympic Games Beijing 2022") to the International Testing Agency (the "ITA"). Any communication sent by the ITA on behalf of the IOC shall be considered as the IOC's communication. The present notification refers to an Adverse Analytical Finding ("AAF") that was notified to you on 8 February 2022 by the Russian Anti-Doping Agency ("RUSADA") in relation to sample n° 170859V (the "Sample") that was collected from you on 25 December 2021 during the 2022 Russian Figure Skating Championships in Saint Petersburg (the "AAF Notification") under the Testing Authority and Results Management Authority of RUSADA. We have been informed by RUSADA that the analysis of the Sample had revealed the presence of the Prohibited Substance "trimetazidine". Trimetazidine is a non-specified substance and is prohibited at all times by the World Anti-Doping Agency ("WADA") - Prohibited List. We have also been informed by RUSADA that pursuant to Article 9.4.1 of the All-Russian Anti-Doping Rules, a Provisional Suspension was imposed against you as of* ***11:36 am (Beijing time) on 8 February 2022*** *as a consequence of the AAF. Pursuant to Article 15.2 of the IOC Anti-Doping Rules applicable to the Olympic Games Beijing 2022 ("IOC ADR"), a decision from a Signatory Anti-Doping Organisation such as RUSADA imposing a Provisional Suspension is recognised and implemented by the IOC. […] In light of the foregoing, you are hereby put on notice that the Provisional Suspension imposed by RUSADA prohibits you from participation in all Events, Competitions and any activity under the authority of the IOC, including the Olympic Games Beijing 2022. In this regard, you are prevented from competing, training, coaching, or participating in any activity, including any potential medal ceremony, during these Olympic Games Beijing 2022".*

17. On 9 February 2022, RUSADA's Head of its Results Management Department informed the ITA, WADA and ISU that, on the same day at 16.30 Moscow time, following the Athlete's request, a provisional hearing had taken place before the DADC on the issue of Provisional Suspension of the Athlete, and *"The Committee reviewed the materials presented during the hearings and approved the request of the athlete. The provisional suspension imposed by RUSADA was cancelled. The resolutive part of the decision, as well as the final decision will be sent to you as soon as possible after it is prepared".*

18. The Appealed Decision found the following:

> *"Based on the above, pursuant to clause 9.4.3 of the Rules, the Committee decided to lift the provisional suspension of the athlete Valieva Kamila".*

19. On 10 February 2022, RUSADA forwarded to the ISU, WADA and ITA an email with four attachments: the case file, the doping test history of the Athlete from WADA's Anti-Doping Administration and Management System ("ADAMS"), a picture of the front page of the medication (in Russian language) showing the letters TMZ and on the back side the product data, including the date of expiry of validity ("0524").

20. Later on, the same day RUSADA also forwarded to the same recipients as in the prior paragraph two videos recording of the hearing in Moscow and the oral issuance of the decision of the DADC.

21. An English version of the reasoned Appealed Decision was provided by RUSADA to the other Parties on 11 February 2022.

IV. THE GROUNDS OF THE APPEALED DECISION

22. With regard to the Parties' position, during the hearing, RUSADA requested the DADC to uphold the provisional suspension from the Athlete based on the fact that the substance detected in the Athlete`s sample is other than a specified substance which requires the prompt imposition of Provisional Suspension according to clause 9.4.1 of the Russian ADR.

23. The Athlete was represented by her mother and by counsel. According to the Athlete`s representatives, the Athlete did not use the prohibited substance intentionally, not even for medical reasons and contamination is the most possible route of injection of the prohibited substance in her system, which may have occurred as a result of domestic interaction with her grandfather who uses "Trimetazidine" after heart replacement surgery and usually carries the medication with him. The Athlete's mother testified that the Athlete`s grandfather regularly drives her to the first and second daily training sessions, waits for her at the training centre until training is over and then drives her back home where he stays with the Athlete during lunch break. A video recording was viewed during the hearing which was made by the Athlete`s grandfather according to the Athlete`s representative, showing the Athlete's grandfather with a package of "Trimetazidine MV" in his car. In addition, according to an extract from ADAMS, on the Athletes' doping test history submitted by the Athlete`s representatives, the Athlete underwent multiple doping-controls from 24 August 2019 to 7 February 2022, including sample collection sessions on 30 October 2021 (before the positive doping sample), on 13 January 2021 and on 7 February 2022 (after the positive doping sample) and the Athlete's samples were all negative.

24. The medical expert Andrey Zholinskiy, called by the Athlete's representatives, explained that Trimetazidine requires a prescription, a therapeutic effect requires regular intake, it is forbidden for use in children, the substance produces side-effects like dizziness and extrapyramidal disorder which are detrimental to sports like figure skating where coordination is essential. Intake through contamination is possible, and traces can be found in samples even if somebody in the Athlete's environment uses this medication and this could happen through contaminated objects.

25. The second medical expert, called by the Athlete's representatives, Eduard Bezuglov, confirmed the need for the substance to be taken on a regular basis to offer benefits, and referred the Panel to the study «*The prevalence of trimetazidine use in athletes in Poland: excretion study after oral drug administration*» by the Polish authors Anna Jarek, Marzena Wójtowicz, Dorota Kwiatkowska, Monika Kita, Ewa Turek-Lepa, Katarzyna Chajewska, Sylwia Lewandowska-Pachecka, and

Andrzej Pokrywkain in the Journal «Drug Testing and Analysis», who found in their research that a single use of a dose of 35mg TMZ leads to a concentration of the substance in a sample a day later between 966 ng/ml – 9000 ng/ml. A concentration of 2 ng/ml would require a single use of 35 mg a minimum 5 – 7 days before the competition. Also, the second expert confirmed the probability of contamination and the harmful side-effects of its use.

26. The DADC referred to clause 9.4.3 of the Russian ADR which states that a mandatory provisional suspension may be eliminated if the athlete demonstrates that the violation is likely to have involved a contaminated product (see para 17.9 of the Appealed Decision). Moreover, since the substance detected in the Athlete's Sample is other than a Substance of Abuse, the Athlete shall demonstrate at the comfortable satisfaction level that the prohibited substance entered her system through the use of a contaminated product.

27. The Athlete had to demonstrate on a "balance of probability" that the anti-doping rule violation more likely happened through contamination than not. However, since the Athlete is a minor below 16 years of age, she falls under the definition of a "Protected Person" according to the Russian ADR and the WADC, which means that, with regard to the upholding of a provisional suspension, a lower standard of evidence than a balance of probability is to be applied. The "Protected Person" in fact is in a better position according to the Russian ADR and the WADC. Reference is made to Articles 10.6.1.3 of the WADC and 12.6.1.3 of the Russian ADR, which both identically provide for a reduction of the sanction for an Anti-Doping Rule Violation not involving a Substance of Abuse at Protected Persons, if they can establish No Significant Fault or Negligence to a Reprimand or a period of Ineligibility to a maximum of 2 years depending on the degree of fault. Similar provisions are set out under Articles 10.3.1, 10.3.3, 14.3.7 of the WADC and equivalent clauses of the Russian ADR. In addition, based on the definition of No Fault and Negligence and of No Significant Fault and Negligence in the Appendix to the Russian ADR and the WADC, Protected Persons are exempted from the obligation to establish how a substance came into their system.

28. Based on the general principle that a Protected Person is in a better position according to the Russian ADR and the WADC, the DADC applied the rules on the exemption of a protected person from explaining the presence of a prohibited substance in establishing no significant fault or negligence or no fault can be applied in a similar way to clause 9.4.3 of the Rules when considering the lifting of a Provisional Suspension.

29. With regard to the burden of proof, according to the DADC, the standard set out in clause 9.4.3 of the Russian ADR for establishing an Anti-Doping Rule Violation through a contaminated product should be less severe for a Protected Person, and thus, the Athlete in the present case must prove that there was a "reasonable possibility" (a standard less strict than "balance of probabilities") of consuming a contaminated product which according to CAS jurisprudence refers to a possibility that is more real than fantastic (CAS 2017/A/4968).

30. In this legal framework, the Committee considered that the Athlete established, at least at the "reasonable possibility" level and at the maximum at the "balance of probability" level, that the violation resulted from the ingestion of a contaminated product according to the Definitions

under the Appendix to the Russian ADR and the WADC, i.e. *"a product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search"*.

31. In the DADC's opinion, in fact, the Athlete could have consumed a product which has been contaminated by the drugs used in her inner circle: *"The Athlete assumes that the contamination occurred through dishes used by the Athlete and the Athlete's grandfather (through drinking liquid from the same glass, as well). The Athlete together with her representative intend to conduct further investigation and present the results at the main hearings"*.

32. The DADC relied on the evidence submitted by the Athlete, including the testimony of the Athlete's representatives and the expert testimony, to consider that the entry of a prohibited substance into the Athlete's body through contamination was confirmed.

33. Considering the above, together with the Athlete's anti-doping test history, the concentration of Trimetazidine in the Sample, the Polish study mentioned during the expert testimony, the harmful effect of the substance to children and the side effects on coordination which excludes the conscious use by the Athlete of trimetazidine to improve sports results, the opinions of the invited experts, the DADC concluded that *"a low concentration of the substance of 2.1 ng / ml, in conjunction with negative doping samples taken before and after positive doping sample, indicates that that the Athlete did not take trimetazidine as a course to achieve a therapeutic effect and improve athletic performance"* and that *"the Athlete's representatives were able to establish at a comfortable satisfaction of the Committee that the entry of a prohibited substance into the Athlete's body is highly likely due to contamination"*. Moreover, the DADC also took into consideration that the Athlete's legal representative disputed the positive results of the Sample alleging that the concentration of 2.1 ng/ml, is well below the technical limit of detection of Trimetazidine, which is 10 ng/ml, and may be a technical mistake of the sample analysis in the laboratory and she confirmed at the hearing the intention to request the analysis of the "B" sample.

34. In addition, the DADC recalled that the provisional suspension is not a punitive measure (CAS 2017/A/4968); the imposition or lifting of a provisional suspension must follow the principles of justice and proportionality and leaving the suspension in place should not be *"clearly unfair"* (CAS 2017/A/4968). In this respect, the DADC considered that it would be *"clearly unfair"* to maintain the provisional suspension, taking into account the potential irreparable harm to the Athlete as a result of such measures: *"The Athlete is one of the leaders in figure skating, therefore non-participation in the Winter Olympic Games in Beijing will be an irreparable harm for the Athlete, who is one of the main contenders for gold in the individual classification"*.

35. Finally, maintaining the provisional suspension would be disproportionate also based on the balance of interests of the stakeholders and does not prejudice the outcome of the hearing on the merits of the case.

V. THE CAS PROCEEDINGS

36. On 11 February 2022, at 20:45 (Beijing time), the IOC filed an Application with the CAS Ad Hoc Division against RUSADA with respect to the Appealed Decision (the "IOC Application"). Ms Valieva, the ROC and ISU were named as Interested Parties. In its Application, the IOC also requested that RUSADA be ordered to issue the grounds of the Appealed Decision.

37. At 22:19 (Beijing time), WADA also filed an Application with the CAS Ad Hoc Division against RUSADA and Ms Valieva (the "WADA Application"). The ROC and ISU were named as Interested Parties.

38. At 23:52 (Beijing time), the IOC and WADA Applications were notified by the CAS Ad Hoc Division to the other Parties. *Inter alia,* RUSADA was requested to comment, by 12 February 2022, at 14:00 (Beijing time), on the Evidentiary Request filed by IOC. RUSADA eventually issued the grounds of the Appealed Decision. Therefore, the IOC withdrew its Evidentiary Request.

39. On 12 February 2022, at 09:13 (Beijing time), a third Application was filed by ISU (the "ISU Application") with the CAS Ad Hoc Division against RUSADA, Ms Valieva and the ROC. WADA and IOC were named as Interested Parties. In its Application, the ISU requested that a decision in the matter should have be rendered by no later than 13 February 2022, at 10:30 (Beijing time).

40. The ISU Application was notified to the other Parties on the same day, at 09:52 (Beijing time).

41. At 10:20 (Beijing time), pursuant to Article 15 lit. c para. 1 of the CAS Arbitration Rules for the Olympic Games (the "CAS Ad Hoc Rules"), the Parties were notified of the composition of the Arbitral Tribunal (the "Panel") for the three proceedings, as follows:

    President: Mr Fabio Iudica, Italy

    Arbitrators: Mr Jeffrey G. Benz, United States of America

    Dr Vesna Bergant Rakočević, Slovenia

42. At 12:10 (Beijing time), the President of the CAS Ad Hoc Division decided, pursuant to Article 11(§3) of the CAS Ad Hoc Rules, that the three proceedings shall be consolidated and decided by the same Panel of arbitrators.

43. At 12:17 (Beijing time), a proposal for a procedural schedule, was submitted to the Parties, with a deadline to file comments until 16:00 (Beijing time).

44. At 13:10 (Beijing time), the United States Olympic and Paralympic Committee (USOPC) and the Canadian Olympic Committee (COC) requested the opportunity to be "silent observers" in this procedure.

45. At 18:05 (Beijing time), following input by all the Parties, the Panel issued a new set of procedural directions, and invited the Respondents to file their Answers by 13 February 2022, at 15:00 (Beijing time). The Parties were also summoned to appear at a hearing, scheduled for 13 February 2022, at 20:30 (Beijing time). The Parties were further advised that a hybrid hearing (i.e. with persons attending in person in front of the Panel and others remotely), would have been possible only with the consent of all Parties. In light of the Athlete's objection in this regard, the Panel confirmed that the hearing would take place entirely online.

46. At 18:25 (Beijing time), the CAS Ad Hoc Division forwarded to the Parties a request from the WADA Independent Observers to attend the hearing. Failing a unanimous agreement of all involved Parties, such request was denied by the Panel.

47. At 18:30 (Beijing time), the Panel rejected the request of the USOPC and COC to be deemed as "silent observers", because this procedural status does not exist in the CAS Ad Hoc Rules.

48. At 18:36 (Beijing time), the time limit for the Panel to give a decision was extended by the President of the CAS Ad Hoc Division until 14 February 2022, at 12:00 (Beijing time).

49. On 13 February 2022, at 07:06 (Beijing time), RUSADA filed its Answer.

50. At 09:35 (Beijing time), ISU, after *"[h]aving read the explanation kindly made by RUSADA on the legal position of the* [DADC]*"* requested to *"declare DADC a further Respondent, expand the application submitted by the ISU against RUSADA, the Skater and the Russian Olympic Committee to the DADC and urgently call the DADC to make sure to be represented at the hearing later today"*. On 13 February 2022, at 11:41, the Panel rejected ISU's request to include the DADC, on the grounds that the latter has no standing to be sued.

51. At 14:58 (Beijing time), the Athlete filed her Answer.

52. At 14:58 (Beijing time), the ROC filed its Answer.

53. At 20:30 (Beijing time) a hearing was held by videoconference. In addition to the Panel, Mr Matthieu Reeb, CAS Director General, Mr Antonio de Quesada, CAS Head of Arbitration and Mr Giovanni Maria Fares, Counsel to the CAS, the following persons attended the hearing remotely:

For the IOC:

- Prof. Antonio Rigozzi, Counsel.

For WADA:

- Mr Ross Wenzel, General Counsel;
- Mr Nicolas Zbinden, Counsel;

- Mr Anton Sotir, Counsel;
- Dr Olivier Rabin, Expert;
- Prof. Martial Saugy, Expert.

For the ISU:

- Mr Fredi Schmid, Director General
- Prof. Michael Geistlinger, Counsel
- Ms Christine Cardis, Anti-Doping Director.

For Ms Valieva:

- Ms Kamila Valieva, Athlete;
- Ms Alsu Anvarovna Valieva, Athlete's mother;
- Mr Valeriy Artyukhov, Team manager;
- Dr Philippe Bärtsch, Counsel;
- Mr Ms Anna Kozmenko, Counsel;
- Mr Marco Vedovatti, Counsel;
- Mr Luka Groselj, Counsel;
- Mr Daniil Vlasenko, Counsel;
- Mr Hu Ke, Counsel;
- Mr Eduard Bezuglov, Expert;
- Mr Andrei Zholinskii, Expert;
- Ms Margarita Larshina, Interpreter.

For RUSADA:

- Mr Graham Arthur, Counsel;

- Ms Veronika Loginova, Legal Counsel;
- Ms Valeriya German, Legal Counsel;
- Ms Kristina Coburn, Legal Counsel.

For the ROC:

- Dr Claude Ramoni, Counsel;
- Ms Monia Karmass, Counsel;
- Mr Rodion Plitukhin, Olympic Games Attaché;
- Ms Alexandra Brilliantova, Head of Legal;
- Mr Victor Berezov, Deputy Head of Legal.

54. At the outset of the hearing, the Athlete raised concerns regarding the appointment of Mr Jeffrey Benz as arbitrator given his prior status as a figure skater competing for the United States in his youth and the fact that he was previously employed (15 years ago) by the United States Olympic and Paralympic Committee. Mr Jeffrey Benz clarified that his previous position at the United States Olympic and Paralympic Committee and his nationality do not affect his independence and impartiality to decide the case. However, the Athlete did not formally challenge his appointment at any time. In addition, the Athlete expressed her objections with respect to the jurisdiction of the CAS Ad Hoc Division (see below) and the expedited nature of the procedure. Besides, there were no formal objections to the constitution of the Panel and the Parties confirmed not having any objection as to the specific conduct of the proceedings.

VI. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

55. The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

A. The First Applicant

a. The IOC Submissions

56. The First Applicant filed its Application before notification of the grounds of the Appealed Decision, with the express purpose to *"ensure that the Decision under Appeal is formally reviewed by the Court of Arbitration for Sport (**CAS**), in a de novo hearing in which all the interested parties are heard, prior to the Athlete's next competition"*.

57. The position of IOC with respect to the facts of the case agrees with the description set forth under Section III of the present award.

58. With regard to jurisdiction, the First Applicant contends that the CAS Ad Hoc Division is the competent body to decide the present case based on Article 61(2) of the Olympic Charter and Article 1 and 2 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad Hoc Rules"). The present dispute falls within the jurisdiction of the CAS Ad Hoc Division: a) *ratione materiae* since the *"Athlete has been advised of an AAF which could potentially impact her eligibility to compete in these 'Olympic Winter Games Beijing 2022', and the dispute clearly arose on the occasion of, or in connection with, the Olympic Games"* and b) *ratione temporis "as both the AAF and the decision to lift the provisional suspension have been issued during the 'Olympic Winter Games Beijing 2022'".*

59. The IOC excludes that the present dispute is subject to the jurisdiction of the CAS Anti-Doping Division, *"which is limited to circumstances where an <anti-doping rule violation has been asserted and referred to it under the IOC ADR> or under the anti-doping rules of another International Federation who has delegated first-instance authority to CAS ADD".*

60. The Application complies with the IOC mission to ensure the regular celebration of the Olympic Games, to guarantee the respect to the fundamental ethical principles of Olympism, to protect clean athletes and the integrity of sports *"by leading the fight against doping, and by taking action against all forms of manipulation of competitions and related corruption"* according to Rule 2.9 of the Olympic Charter.

61. Although the IOC is not aware of the grounds of the Appealed Decision at the moment when the Application is filed, it understands that during the hearing, the Athlete relied on a possible contamination (through a medication taken by her grandfather) and raises doubt as to the level of substantiation of such allegations and whether other circumstances were taken into account by the DADC.

62. Against this background, the IOC notes that *"the circumstances allowing the lifting of a mandatory provisional suspension in case of an AAF concerning a non-specified substance before the analysis of the B-sample are narrowly identified at Article 7.4.1 of the WADA Code as incorporated at Article 9.4.3. of the Russian ADR. The IOC is also mindful that Ms Valieva is a minor and that she will benefit from special evidentiary rules in the ultimate hearing on the merits for the AAF".*

63. As a consequence, the IOC stresses the importance of the decision as to whether Ms Valieva's provisional suspension shall remain lifted be taken by an arbitral tribunal after having given all interested parties a fair opportunity to present their case in time in order to determine her participation the upcoming figure skating event on 15 February 2022.

64. The First Applicant preliminarily submitted evidentiary requests with regard to the production of the full case file in relation to the Athlete from RUSADA; and the grounds of the Appealed Decision (to the extent that the grounds for the Appealed Decision do not yet exist, or alternatively, the immediate issuance of such grounds). The IOC later confirmed that these requests were mooted by the production of the Appealed Decision and other documents.

b. The First Applicant's Requests for Relief

65. The IOC submitted the following requests for relief:

(i) *Setting aside the Decision of the RUSADA Disciplinary Anti-Doping Committee to lift the provisional suspension imposed on Ms. Kamila Valieva.*

(ii) *Rendering a new decision after a de novo hearing (Article 16 of the CAS AHD Rules) with all the parties and interested parties having been heard.*

(iii) *Ordering any other relief the Panel deems appropriate under the circumstances.*

B. The Second Applicant

a. WADA's Submissions

66. The Second Applicant also filed its Application before notification of the grounds of the Appealed Decision, based on the urgency of the present case.

67. The facts of the case as set out under Section III of the present award are not in dispute.

68. The Appealed Decision is an appealable decision according to Article 15.2 of the Russian ADR; in addition, since the present case relates to an international-level athlete within the meaning of the Russian ADR, the appeal is subject to CAS according to Article 15.2.1 and WADA has right to appeal pursuant to Article 15.2.3.1(f) of the Russian ADR.

69. The jurisdiction of the CAS Ad Hoc Division is based on the following circumstances: a) the Appealed Decision was rendered and notified to WADA within the period of the OWG 2022 and b) it is clearly connected with the Olympic Games. Indeed, the CAS Ad Hoc Division at the Tokyo 2020 Olympic Games accepted jurisdiction in very similar circumstances where WADA (and World Athletics) appealed against a decision of the Swiss National Anti-Doping Organization to lift a mandatory provisional suspension (see CAS OG 20/006 & CAS OG 20/008).

70. The Athlete alleges having been inadvertently exposed to Trimitazidine due to domestic interaction with her grandfather who used the drug at that time. Although the Athlete did not submit any specific scenario, in support of her allegations the Athlete submitted oral evidence by her mother, a pre-recorded video message from her grandfather in which he claimed to use Trimetazidine periodically when he suffered from 'attacks' and showed a packet of Trimetazidine medication to the camera (her grandfather did not testify at the hearing), as well as oral expert evidence from Dr Andrey Zhalinskii and Dr Eduard Bezuglov.

71. The position of the two scientific experts was, in essence, that the concentration in the Athlete's sample was compatible with contamination. The experts conceded, however, that the AAF was also compatible with the end of the excretion period after a full dose of Trimetazidine.

72. The Athlete's provisional suspension was correctly imposed according to Article 9.4.1 of the Russian ADR; furthermore, WADA stresses that according to Article 9.4.3, suspension may be lifted only if athletes can demonstrate that the relevant violation was most likely caused by the use of a contaminated product, which, according to the Russian ADR is as a *"product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search"*.

73. As Trimetazidine is not a Substance of Abuse, the only basis in the applicable rules to lift the mandatory provisional suspension is if the Athlete demonstrates that the violation is likely to have involved a Contaminated Product.

74. The grounds for lifting a provisional suspension are subject to restrictions. The underlying reason is that *"Allowing athletes that have tested positive for non-specified substances to participate in competitions pending the final adjudication of their case would risk negatively affecting the sporting integrity of those competitions. This is all the more the case as the default position under art. 10.10 of the World Anti-Doping Code (and art. 12.10 of the Russian ADR) is that, once the anti-doping rule violation is established, all the competitive results of the Athlete after the date of the violation shall be disqualified"*.

75. The Athlete's explanation does not involve a Contaminated Product; this excludes by itself any basis to lift the mandatory provisional suspension. The Athlete's explanation involves some form of exposure to a medication that contained Trimetazidine as an ingredient. The Athlete declared the following three products on her Doping Control Form at the Doping Control: L-carnitine, supradyn and hypoxen4. However, she has not sought to argue that any of these products was a Contaminated Product. Therefore, the Athlete necessarily cannot meet the criteria to have her (mandatory) provisional suspension lifted.

76. An athlete bears the burden to prove that the explanation of the exposure to Trimetazidine is more likely than not. As it has been confirmed by CAS jurisprudence, the fact that an explanation is possible, is not sufficient (CAS 2020/A/6978 & 7068; CAS OG 16/025) and also that *"an athlete must provide actual evidence as opposed to mere speculation"* (CAS /A/2014/3820).

77. In addition, an athlete must also demonstrate that the source could have caused the specifics of the adverse finding (CAS 2010/A/2277; CAS 2017/A/5139; CAS 2017/A/5260; CAS 2017/A/5369).

78. On the contrary, the Athlete failed to provide evidence that her explanation is "most likely": a) First, there is no independent and/or documentary evidence that the Athlete's grandfather used Trimetazidine. There is, without limitation, no proof of purchase, no underlying medical records, and no prescription; b) Second, there is no scientific evidence as to whether the specifics of the AAF (in particular the concentration of Trimetazidine) are compatible with the athlete's explanation of the accidental exposure.

b. The Second Applicant's requests for relief

79. WADA requested the following relief:

"The Appealed Decision (i.e. the decision of the Disciplinary Anti-Doping Committee dated 9 February 2022 in the matter of Kamila Valieva) is set aside; and

A provisional suspension is imposed on Kamila Valieva with immediate effect".

C. The Third Applicant

a. ISU's Submissions

80. The Third Applicant's submissions may be summarized, in essence, as follows:

81. As to the main facts, ISU agrees with the description set forth under Section III of the present award.

82. As to jurisdiction, ISU contends that the Appealed Decision is an appealable decision according to Article 15.2 of the Russian ADR; in addition, since the present case relates to an international-level athlete within the meaning of the Russian ADR, the appeal is subject to CAS according to Article 15.2.1 and ISU has right to appeal pursuant to Article 15.2.3.1(c) of the Russian ADR.

83. Jurisdiction of the CAS Ad Hoc Division is based on Article 61(2) of the Olympic Charter and Article 1 of the CAS Ad Hoc Rules.

84. With regard to the competence *ratione temporis*, ISU referred to CAS jurisprudence in CAS OG 14/003 at para 5.28 which established the following:

> *"It is accepted that the date when a dispute arises is in general – in fact in most cases – the date of the decision with which the Applicant disagrees ("a disagreement on a point of law or fact" as stated by the ICJ). Such a date can arise later, in some cases, if, for example, the decision is not selfexplanatory and requires some explanation in order for the Parties to know with certainty that they are in disagreement. Evidence would be required to establish whether a later date than the date of the decision should apply".*

85. This CAS finding was confirmed by CAS OG 20/006 and CAS OG 20/008, at para 5.10 (see Exhibit 22 of the Third Applicant).

86. Based on the foregoing, ISU submitted that the dispute arose during the OWG 2022 by the Appealed Decision communicated to the ISU without reasons on 10 February 2022, at 0.12 am Beijing time and with reasons on 11 February 2022, at 10.18 pm Beijing time; i.e., when the ISU became aware of the disagreement with the DADC.

87. With reference to CAS OG 14/003, CAS OG 20/006 and CAS OG 20/008, the ISU considers that the dispute relates to whether the DADC was allowed to lift the Provisional Suspension under the applicable article 9.4.3 of the Russian ADR which states the same as article 7.4.1 ISU Anti-Doping Rules.

88. The reasoning on which the DADC based the Appealed Decision to lift the provisional suspension on the assumption that the Athlete is a Protected Person falls outside the scope of Article 9.4.3 of the Russian ADR with respect to the element of a Contaminated Product and is not justified: *"Without any legal basis for applying analogy, the* [DADC] *takes the liberty to assume a privilege of a protected person with regard to article 9.4.3 of the AllRussian Anti-Doping Rules and the corresponding provision in the WADC. If the WADC had wanted to expand the privilege for protected persons to the issue of a Provisional Suspension, this had been included in the definitions or accommodated in the text of the relevant article"*.

89. In fact, ISU objects that the DADC has created *"a new standard of proof for a Protected Person below the standard of balance of probability and calls it the "standard of reasonable possibility" and last, but not least, allows also for a special term of 'Contaminated Product', when it comes to a Protected Person"*, providing a sophisticated model of how to escape a rule violation.

90. Moreover, the criteria of irreparable harm, balance of interests and likelihood of success have been developed by CAS for provisional measures; application by analogy of such principle to a Provisional Suspension without authorization is arbitrary.

91. Therefore, the standard to meet is the balance of probability as Article 9.4.3 of the Russian ADR applies to both protected and non-protected Skaters in the same manner:

> *"Given the text of article 9.4.3 of the AllRussian Anti-Doping Rules, the nature and the concept of a Provisional Suspension, there is no difference to be seen between a Protected Person and any other Skater. For both the last sentence of article 5.1 of the AllRussian Anti-Doping Rules must be considered. This provision, which, with the exception of the reference to authority and provisions, is identical with article 3.1 last sentence ISU Anti-Doping Rules reads as follows: "Where these Rules place the burden of proof upon the Skater or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 5.2.2 and 5.2.3 of these Rules, the standard of proof shall be by a balance of probability"".*

92. According to CAS jurisprudence, the balance of probability standard means that *"the Appellant must demonstrate the origin of the prohibited substance on the "balance of probability" standard, by providing actual evidence as opposed to mere speculation"* (CAS 2019/A/6319, at para 48).

93. On the contrary, the Athlete provided the DADC with pure speculations on whether the violation is likely to have involved a Contaminated Product; in addition,

> *"The* [DADC] *followed this approach in its reasoned decision by re-defining the term "Contaminated Product" for a Protected Person. The scenario that the grandfather uses TMZ as medication, shares car and home with the Skater and uses the same dish and glass, which then causes rests of the medication to enter the system of the Skater does not allow to speak of a Contaminated Product and see the requirements of this article met"*.

94. In addition, the assumption that a metabolic modulator like Trimitazidine would not enhance sport performance as maintained by the medical experts called by the Athlete is false, as

metabolic modulators *"are popular in sports where strength is an important factor and can suppress the production of estrogen, or prevent the normal conversion of testosterone into estrogen. They can remove natural limitations like that of muscle growth of the body (Exhibit 25). Metabolic modulators increase glucose metabolism at the expense of free fatty acid metabolism and enhance so efficient use of oxygen* (Exhibit 26)*"*.

95. Finally, another requirement is not met by the Athlete since she failed to establish that the ingestion has taken place out-of-competition and unrelated to sports performance, deriving from the fact that the ingestion itself cannot be demonstrated on a balance of probability.

b. The Third Applicant's requests for relief

96. ISU submitted the following request for relief:

> *"1. CAS Ad Hoc Division for the Beijing Games 2022 is requested to declare that it holds jurisdiction for the case.*
>
> *2. CAS Ad Hoc Division is requested to set aside the decision of RUSADA Disciplinary Antidoping Committee of 9 February 2022.*
>
> *3. CAS Ad Hoc Division is requested to re-instate the Provisional Suspension imposed by RUSADA on 8 February 2022, Nr VV-545 with immediate effect"*.

D. The First Respondent

a. The First Respondent's Submissions

97. RUSADA agrees with the factual framework set forth under Section III of the present award.

98. In addition, it emphasized that although standard operating practice is for biological samples to be analysed within a period of two weeks from receipt, the laboratory's analysis of the Sample was delayed seemingly due to a backlog of sample analysis caused by pandemic-related staff shortages prior to 25 December 2021, exacerbated by further pandemic-related absences in January 2022.

99. According to the First Respondent, the Athlete had a very limited time within which to prepare a position and present evidence before the DADC, and the evidence that she was able to present by way of her representatives may not have been the complete evidence available.

100. The position submitted by RUSADA before the DADC was the following: a) provisional suspension was a mandatory measure in the present case since Trimetazidine is a Non-Specified Prohibited Substance; b) the Russian ADR and the WADC provide that a Provisional Suspension can only be removed if evidence is provided that establishes that an Adverse Analytical Finding *"was most likely caused by the Use of a Contaminated Product or pertains to a Substance of Abuse"*; c) the evidence that the Athlete provided at the hearing was not sufficient to satisfy the grounds stated in the Russian ADR with regard to the lifting of the Provisional Suspension:

"It did not appear to RUSADA that, in the time available, the Athlete had been able to gather sufficient evidence to establish that the presence of trimetazidine in the A Sample was most likely caused by the use of a Contaminated Product".

101. RUSADA is confident that the Athlete will be able to complete her submission with respect to evidence in the present proceedings before CAS. The hearing before CAS will be *de novo* and will provide a platform for a full and comprehensive review of that evidence.

102. The Appealed Decision correctly identifies that the Athlete is a Protected Person; however there does not appear to RUSADA to be any provision in either the Russian ADR or the WADC that establishes that the Athlete has a lesser burden of proof than the 'balance of probabilities' by virtue of being a Protected Person.

103. In addition, the First Respondent specified that the DADC is an independent and impartial body from RUSADA and that its decisions, as is the Appealed Decision cannot be conflated with RUSADA's decisions.

b. The First Respondent's Requests for Relief

104. RUSADA requested the following relief:

"The hearing on 9 February 2022 was convened at very short notice and did not provide for an opportunity for an in depth examination of the evidence relating to the AAF, and its possible source. The hearing of the Applications before CAS provides an opportunity for a de novo hearing to take place at which all interested parties may be heard and a full consideration by CAS of all the relevant evidence to take place.

Based on that evidence CAS will determine whether or not the Athlete can establish, on a balance of probabilities, that the grounds referred to in Article 9.4.3 of the ADR apply.

That no further measures, remedies, or other orders are required save that CAS may wish to limit the extent to which its decision is made public, consistent with the restrictions in the Code applicable to the publication of information concerning Protected Persons".

E. The Second Respondent

a. The Second Respondent's Submissions

105. As a preliminary issue, the Second Respondent objected that the CAS Ad Hoc Division does not have jurisdiction to adjudicate this matter based on the following grounds.

106. Although Article 15.2 Russian ADR, provides that *"a decision to apply or lift a provisional suspension based on a preliminary hearing"* can be appealed before CAS, there is no provision in the Russian ADR granting jurisdiction to the CAS Ad Hoc Division; therefore, the CAS Appeals Division should be the competent body.

107. Moreover, the present matter *"does not concern a dispute arising on the occasion of or arising out of the Olympic Games"* while it involves a decision taken by the DADC, in relation to a sample taken 41 days before the Olympic Games, and whose effects are not limited to the Olympic Games. The requirements under Article 1 of the CAS Ad Hoc Rules to establish the jurisdiction of the CAS Ad Hoc Division are not met, both with regard to jurisdiction *ratione materiae* and with regard to jurisdiction *ratione temporis*.

108. As to jurisdiction *ratione materiae* it is objected that: a) the Sample was not collected, and the alleged violation was not committed on the occasion of or in connection with the Olympic Games; b) RUSADA did not act as the *Results Management Authority* of the Games when it decided to provisionally suspend the Athlete; c) the Provisional Suspension did not specifically target the Games; d) the decision to lift the Provisional Suspension was rendered by an authority – the DADC – who is alien to the Games; e) the Appealed Decision was not rendered in connection with the Olympic Games.

109. As to jurisdiction *ratione temporis* it is objected that: a) the Sample was taken on 25 December 2021; b) the fact that the Appealed Decision was rendered during the OWG 2022 is a pure coincidence due to an irregular delay of the Anti-Doping Laboratory and cannot create any basis for jurisdiction of the CAS Ad Hoc Division *ratione temporis*.

110. Besides, the expedited procedure before the CAS Ad Hoc Division does not allow sufficient time to safeguard the Athlete's due process rights; while the Athlete would have more possibilities to defend her case before the CAS Appeals Division (also considering that she was not allowed to have her B-Sample analyzed yet): *"Had the Applicants filed their applications before the CAS Appeals Arbitration Division, as they should have, Kamila would at least then have had the right to appoint an arbitrator and would have had sufficient time to prepare her defense, including by presenting medical science based detailed expert evidence"*.

111. Secondly, IOC and WADA submitted their Applications even before the notification of the grounds of the Appealed Decision, and thus were not able to substantiate their case, which fact itself is a sign of their unjust motives.

112. As to the merits, the Athlete concurs with the factual framework set forth under Section III of the present awards. The following facts are emphasised in her submissions:

113. That the Test Report was issued only on 7 February 2022, which is 44 days after the collection of the Sample; that such irregular delay cannot go to the detriment of the Athlete, also with regard to the burden of proof in relation to the use of a Contaminated Product; that the detected substance is a medication against heart disease, whose performance enhancement potential is scientifically not proven or at least questioned and has harmful potential side effects which have negative impact on coordination; that the level of concentration of Trimetazidine in the Sample was extremely low; that her previous tests have never been positive and, in particular, the two anti-doping tests prior and during the Olympic Games, on 13 January and 7 February 2022, were both negative.

114. WADA and IOC are disregarding the fact that the Athlete's status as a Protected Person under the applicable anti-doping provisions needs to be taken into account in the present case, in particular because of the severe consequences and irreparable harm that the reinstatement of a provisional suspension would cause her. In this regard, as a Protected Person, the Athlete does not need to prove contamination with the Prohibited Substance in order for the Provisional Suspension to be lifted. In fact, it is noteworthy to underline that if a Protected Person benefits from a more lenient treatment in terms of sanctions (Article 10.5 WADC; Article 12.5 Russian ADR; Article 10.6.1.3 WADC; Article 12.6.1.3 Russian ADR), a similar more lenient treatment must obviously also apply at the stage of the provisional suspension assessment, failing which a provisional suspension may have greater consequences than a sanction if an anti-doping rule violation is found to have been committed.

115. In this respect, the Athlete argues that as a Protected Person, she does not need to adduce actual evidence of a contamination in order to have a mandatory provisional suspension lifted under article 9.4.3 Russian ADR, since what needs to be established is not the actual use of a contaminated product, but the mere likelihood of the use of a contaminated product, i.e. that a contamination is more likely than any other explanation (the intentional ingestion of Trimetazidine). The wording *"most likely"* under Article 9.4.3 Russian ADR indicates that the burden of proof is neither *"certainty"* nor *"comfortable satisfaction"*. The threshold of proof is lower. Under CAS case law the standard must be a *"reasonable possibility"*. The Athlete has met this standard since she has demonstrated that given the extremely low concentration of the Prohibited Substance in the Sample, there is a very high probability that the substance entered Kamila's body by touch, accidental contact with the packaging and/or traces of the medication within the family context though domestic interaction with contaminated objects.

116. In fact, after having considered all the circumstances and evidence of the present case, the DADC finally found that the Athlete did not take the prohibited substance as a course of treatment to achieve therapeutic effects or enhance sports performance.

117. The Athlete contends that the source of inadvertent contamination has been established by the DADC after careful analysis, in connection with the Athlete's interaction with her grandfather, who regularly takes the medicine Trimetazidine to cure his condition and the DADC has also accepted that she would not have any competitive advantages by consuming the substance in question, based on the medical experts' testimonies.

118. In this respect, the DADC correctly acknowledged that the Athlete is a Protected Person due to her age and therefore considered that a lower standard of proof should apply, specifically a "reasonable possibility" test, which is a *"less stringent standard than 'balance of probabilities'"*.

119. Not to mention that there is also a probability that the Anti-Doping Laboratory might have made a technical mistake, which is compatible with the extremely low concentration in the Sample. This is why the Athlete will request the analysis of the B-Sample.

120. In such a context, it cannot be disregarded that the delay of the WADA-accredited Anti-Doping Laboratory has *de facto* made it impossible for the Athlete to conduct timely investigation and

bring actual proof of the contamination. Therefore, it would be highly unfair and disproportionate to make the Athlete bear the consequences of such irregular delay: *"In other words, the CAS ADH cannot request Kamila to prove the origin of trimetazidine, because this would amount to a probatio diabolica"*.

121. Furthermore, it has to be considered that the Provisional Suspension is an interim measure aimed at prohibiting an athlete or other person from participating in any competition pending the decision on the merits. As such, the following requirements must be met when the addressee of a Provisional Suspension requires its lifting: a) there must be a likelihood of success on the merits; b) there must be irreparable harm; c) the interests of the applicant overweigh those of the opposing party. During the hearing before the DADC, the Athlete demonstrated that all these requirements were met.

122. In addition, the Athlete's young age must also be given special consideration in light of relevant human rights instruments, in particular the United Convention on the Rights of the Child.

123. To set aside the Appealed Decision and reinstate the Provisional Suspension, excluding her from the competition on 15 February 2022, would cause irreparable harm to the Athlete who is one of the leaders in world figure skating and is a real contender for the Olympic gold. Such irreparable harm cannot be repaid by monetary relief or any other equivalent.

> *"Moreover, should the Provisional Suspension be maintained, Kamila would de facto be sanctioned for the Alleged ADRV in the absence of a completed (or any, as a matter of fact) investigation because the B sample has not yet been opened, and without a decision on the merits. Such a de facto sanction is not compatible with the very nature of a Provisional Suspension, which should not be a punitive measure, let alone would it be proportionate"*.

124. As to the balance of interests, the Athlete put forward the following arguments:

> *"In these circumstances, if the Decision was to be overturned and a provisional suspension reinstated, Kamila's interests would be flatly disregarded, in violation of fundamental principles, such as the presumption of innocence, the right to be heard and the right to a fair trial. A decision denying the Applicants to reinstate the Provisional Suspension would not harm their interests, nor that of any third parties. Neither WADA, the ISU nor the IOC invoked any overriding interest in their applications, saved for an alleged "unfair competition", which makes absolutely no sense because nobody, not even the Applicants, are alleging that Kamila is obtaining an advantage from the Alleged ADRV during the Games. In other words, her participation at the Games would certainly not affect the fair competition of figure skating"*.
>
> *"Equally, Kamila's participation of in the Olympic Games will not damage their integrity, because – and it is important to recall it – the A sample has not even been confirmed by the B sample. There is indeed the possibility that the B sample will confirm that Kamila did not commit any ADRV"*.

125. Finally, the Athlete argued that the reinstatement of the Provisional Suspension would not comply with the principle of proportionality, since the Applicants have failed to even explain

what the goal of reinstating the Provisional Suspension would be in this case and why such measure would be necessary to reach that (unexplained goal).

126. In view of the foregoing, the decision to lift the provisional suspension is justified and must be upheld.

b. The Second Respondent's Requests for Relief

127. The Athlete submitted the following requests for relief:

> *"(1) Declare that it lacks jurisdiction to hear the matter;*
>
> *(2) In any event dismiss the Applications filed by the International Olympic Committee, the World Anti-Doping Agency and the International Skating Union and confirm that the decision dated 9 February 2022 to lift the Provisional Suspension stands;*
>
> *(3) Order the International Olympic Committee, the World Anti-Doping Agency and the International Skating Union to pay the costs of the arbitration (if any) as well as Ms Kamila Valieva's legal fees and expenses".*

F. The Third Respondent

a. The Third Respondent's Submissions

128. With regard to the merits, the ROC agrees with the statement of facts set forth under Section III of the present award.

129. As to procedural aspects of the present arbitration, the Third Respondent pointed out the following: a) the limited time granted to the Athlete (less than 48 hours) to prepare her defence; b) the ROC cannot be considered as a true "Respondent" in the proceedings since it did not play any role in the result management process of this national case which was exclusively handled by RUSADA, although the ROC has nevertheless the right to take part in the proceedings according to the CAS Ad Hoc Rules; c) the ROC did not take any position with regard to the Athlete's challenge of the CAS Ad Hoc jurisdiction, leaving it to the Panel to decide the matter.

130. With regard to the substance, the ROC emphasizes that the present case shows that there was a breach of the International Standards of Laboratories by the Anti-Doping Laboratory, namely Article 5.3.8.4 which provides that *"reporting of "A" Sample results should occur in ADAMS within twenty (20) days of receipt of the sample"*. This breach is detrimental to the Athlete which suffers the following negative consequences: a) she is deprived from her fundamental right to have the B-sample analysed; b) It is materially impossible for the Athlete to collect evidence and to establish the origin of a prohibited substance in a couple of days, whilst she is in Beijing. If there had not been such delay, she would have benefited from 20 days before the CAS Appeals Division.

131. In such context, the standard of proof claimed by the Applicants is impossible to meet and must be disregarded: *"If a party is in a situation of probatio diabolica, his factual allegations shall be deemed proven, in the absence of other evidence refuting the allegations by such party"*.

132. Therefore, the ROC requests the Panel to apply the general principle of law and of fairness when assessing the Athlete's explanations and evidence, as this is supported by CAS jurisprudence in a similar case (CAS 2019/A/6443 & 6593).

133. Moreover, the Applicants give a strict reading of Article 9.4.3 of the Russian ADR failing to consider that the Athlete is a Protected Person, and she does not need to prove how the substance entered her body to benefit from a reduction of sanction for No Significant Fault or Negligence, notably in case of a Contaminated Product.

134. Such understanding must be rejected by adopting the principle governing the interpretation of law rather than of contracts, according to well-established CAS jurisprudence (CAS 2013/A/3365 & 3366 §§137 *et seq*). The starting point should be therefore the literal interpretation; secondly, inconsistencies/ambiguities in the rules must be construed against the legislator, as per the principle of *"in dubio contra proferentem"*.

135. The ROC submits that the text of article 9.4.3 Russian ADR is ambiguous and unclear in the circumstances that the adverse analytical finding is reported in connection with a Protected Person, i.e. an athlete who is below 16-year-old, as the Athlete.

136. In fact, while Protected Persons do not need to prove how a prohibited substance entered their system to benefit from a reduction of sanction for "No Significant Fault or Negligence", there is a lacuna in Article 9.4.3 Russian ADR with respect to a Protected Person in case of Provisional Suspension. Such lacuna needs to be filled-in by the Panel by way of interpretation, in accordance with the CAS case law.

137. The Third Respondent argues that the provision under article 9.4.3 Russian ADR has to be reconciled with the general provision that, on the merit, Protected Persons do not need to establish the cause of a doping offence.

138. The same reasoning applies with regard to Articles 12.6.1.1, 12.6.1.2 and 12.6.1.3 Russian ADR: *"In other words, in case of an antidoping rule violation implying a Specified Substance, a Contaminated Product or a Protected Person, the sanction is the same in case of No Significant Fault or Negligence, i.e. at a minimum a reprimand and at a maximum a two-year period of ineligibility. One cannot see why some circumstances listed in article 12.6.1 Russian ADR could open the door to the lifting of a provisional suspension, and not the fact that the athlete is a Protected Person"*.

139. On 12 February 2022, the ROC sent a question by email to the independent members of the WADA 2021 Code Drafting Team (Prof. Ulrich Haas, Ms Liz Riley, Mr Richard Young) to know *"whether the absence of reference to "Protected Persons" in the context of Section 7.4 of the World Anti-Doping Code has been done on purpose, or whether it could be seen as an oversight or a lacuna"*. Prof. Haas answered that, even though he is not allowed as a CAS Arbitrator to provide an opinion as to

the interpretation of this rule, he could testify that there had been no discussion in the context of the 2021 Code revision with respect to the specific issue to coordinate the provisions on ineligibility of Protected Persons with the provision on Provisional Suspension.

140. A systematic assessment of the Russian ADR and of the WADC shows that being a Protected Person must be taken into consideration when interpreting the rules. In fact, the Russian ADR and the WADC contain numerous provisions where Protected Persons are subject to a "milder" system of sanctions than other athletes (Articles 4.3, 4.5, 17.3.7,); being a Protected Person is a factor to assess the "Fault" as per the definition of this word in the Russian ADR; Protected Persons do no need to prove how the prohibited substance entered their body to benefit from No Fault or Negligence or No Significant Fault or Negligence; Protected Persons who have committed No Significant Fault or Negligence can benefit from a reduction of the period of ineligibility between a reprimand and two years, even in case of a non-specified substance.

141. Furthermore, an historic analysis of the successive versions of the WADC shows that when a new possibility for an athlete to obtain a reduced sanction was introduced in the regulations, the provision on provisional suspensions was adapted. It is obvious that there should be a coordination between the provisions governing sanctions (including the possibility to reduce sanctions), and the provisions on provisional suspensions.

142. Moreover, according to the principle *in dubio contra proferentem*, the rule shall be interpreted in a way that is favourable to the Athlete, implying that there is no strict requirement, for Protected Persons, to show how the substance entered their body in order to have a provisional suspension lifted.

143. Finally, the strict approach followed by WADA (and ISU) in the present case with respect to the lifting of a provisional suspension is not applied consistently. Notably in case of particular circumstances (such as the long excretion time of meldonium, contaminated meat, etc), provisional suspensions have been lifted in hypotheses which are not contemplated by art. 9.4.3 Russian ADR / art. 7.4.1 WADC. The same shall apply in the case of the Athlete, in the exceptional circumstances of a Protected Person reporting an adverse analytical finding.

144. As to the standard of proof, the references by WADA and ISU that, to benefit from a lifting of a mandatory provisional suspension, the Athlete should demonstrate *"the origin of the prohibited substance"* are wrong based on Article 12.6.1 Russian ADR in connection with the definition of No Significant Fault or Negligence and also on the consideration that in order to have a mandatory provisional suspension lifted as per article 9.4.3 Russian ADR, what needs to be proven is not the use of a Contaminated Product, but the likelihood of use of a Contaminated Product, which shows that the standard of proof is lower.

145. Therefore, the proper test to be applied by the Panel is not whether the Athlete proved how the substance entered her body, but whether her explanations are "likely", bearing in mind that as a Protected Person she does not need to prove how the substance entered her body.

146. The ROC requests the Panel to apply the principle of proportionality, taking into consideration all aspects of the case at hand, including that the Athlete could on the merit be sanctioned with a reprimand for No Significant Fault or Negligence, without having to prove how the prohibited substance entered her body, and that she returned several negative tests in 2022. In this respect, the ROC submitted that any provisional sanction being harsher than the sanction that could be imposed after a full hearing of the case would be per se disproportionate.

147. Since in the present case concrete evidence showing the source of the contamination is not required (as the Athlete is a Protected Person) and are not available (due to the undue delay in the reporting of the adverse analytical finding by the Anti-Doping Laboratory), the Panel must rely on circumstantial evidence and decide to confirm the Appealed Decision if the scenario submitted by the Athlete with regard to contamination with the Prohibited Substance is more likely that the different scenario of a voluntary ingestion.

b. The Third Respondent's Requests for Relief

148. The Third Respondent submitted the following requests for relief:

> *"The Russian Olympic Committee respectfully applies for the Ad hoc Division of the Court of Arbitration for Sport to dismiss the Applications filed by the International Olympic Committee, the World Anti-Doping Agency, and the Ice Skating Union in the arbitration cases CAS OG 22/08, CAS OG 22/09 and CAS OG 22/10, provided that the Panel finds that it has jurisdiction".*

VII. JURISDICTION AND ADMISSIBILITY

149. Rule 61.2 of the Olympic Charter provides as follows:

> *"61 Dispute Resolution*
>
> *[…]*
>
> *2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".*

150. The jurisdiction of the CAS Ad Hoc Division in relation to the Applicant also arises out of the Entry form signed by each and every participant in the Olympic Games, as established By-law to Rule 44.6(ii) of the Olympic Charter.

151. Article 1 of the CAS Ad Hoc Rules provides as follows:

> *"Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS) The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise*

during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

152. The Panel observes that although, in principle, the jurisdiction of the CAS is undisputed between the Parties, the Athlete argues that the CAS Appeals Division would be the competent body to hear the present dispute instead of the CAS Ad Hoc Division.

153. In this respect, the Panel recalls that, according to the Athlete, the CAS Ad Hoc Division lacks jurisdiction both *ratione materiae* (Article 61 Olympic Charter) and *ratione temporis* (Article 1 CAS Ad Hoc Rules). This because there is no element connecting the dispute to the Olympic Winter Games: the Sample was collected on the occasion of the 2021 Russian Figure Skating Championship which took place in Saint Petersburg; the alleged violation was not committed on the occasion of or in connection with the OWG 2022; the Provisional Suspension does not specifically target the OWG 2022, nor was it imposed by an authority of the Games; the Appealed Decision was not rendered in connection with the OWG 2022 nor by an authority which is connected with the Games. Further, the Sample was taken on 25 December 2021 and the fact that the Appealed Decision was rendered during the OWG 2022 is a pure coincidence, which does not create any chronological connection within the scope of Article 1 of the CAS Ad Hoc Division.

154. After careful analysis, and after further assessment of the Parties' positions on the issue during the oral presentation at the hearing, the Panel rejects the Athlete's arguments.

155. The Panel, in fact, concurs with the position of the IOC in this respect that the reasons put forward by the Athlete in order to challenge the jurisdiction of the CAS Ad Hoc Division are misconceived for the following reasons:

156. As to the first objection raised by the Athlete, *i.e.* jurisdiction *ratione materiae*, the Panel notes the following: the CAS Ad Hoc Division has jurisdiction over disputes envisaged under Article 61(2) of the Olympic Charter, i.e. dispute *"arising on the occasion or in connection with the Olympic Games"* which means that attention should be paid to the dispute and what the dispute is about. In the present case, the Panel is satisfied that the dispute is not about the collection of the Sample or the relevant test, or whether there has been a violation of an anti-doping rule or not.

157. The dispute is about whether the Appealed Decision which has lifted the Provisional Suspension should be set aside or not; i.e., whether the Suspension should be reinstated or not. As such, it is uncontested that the dispute is directly connected with the Games, since the outcome of the dispute is relevant for the Athlete's further participation in the OWG 2022.

158. At the hearing, the ROC argued that the second paragraph of Article 1 of the CAS Ad Hoc Rules does not foresee the possibility to appeal decisions issued by National Anti-Doping Agencies (but did not raise this as a formal objection to the jurisdiction of the CAS Ad hoc Division). The Panel notes, however, that the second paragraph of Article 1 of the CAS Ad Hoc Rules refers to the exhaustion of internal legal remedies only. Therefore, this argument is rejected. Indeed, the *"dispute"* is the connecting factor, irrespective of the authority that rendered the Appealed Decision and there is also no requirement in this respect under Article 1 of the CAS Ad Hoc Rules. As a consequence, it is irrelevant that RUSADA did not act as an authority of the Games or is not listed among the sports authorities at Article 1 of the CAS Ad Hoc Rules.

159. The fact that the Provisional Suspension was not aimed at the participation to the OWG 2022 is also not required under Article 1 of the CAS Ad Hoc Rules, given that the relevant suspension has an actual connection with the Athlete's participation in the OWG 2022.

160. Besides the factual connection, there is also a legal connection of the present dispute to the OWG 2022, deriving from Article 15.1.1.1 of the WADC 2021 which establishes that a decision imposing a Provisional Suspension automatically prohibits the athlete or any other person to from participating in all sports within the authority of any Signatory.

161. Therefore, the Athlete's challenge based on the lack of jurisdiction *ratione materiae* is dismissed.

162. As to the second objection raised by the Athlete, i.e., jurisdiction *ratione temporis,* the Panel notes that it is uncontested that the Appealed Decision which gave rise to the dispute was rendered during the period considered to be relevant under Article 1 CAS Ad Hoc Rules, i.e. during the OWG 2022. In this respect, it is irrelevant whether the initial facts at the basis of the dispute may have arisen at a previous stage.

163. The Athlete also argued at the hearing that she would have had the opportunity under the appeal provisions of the CAS Code of Sport-related Arbitration to select an arbitrator to hear her case and she did not have that opportunity under the CAS Ad Hoc Rules. She also asserted that the under the appeal provisions she would have been able to select from a much broader list of possible arbitrators and that she would have had longer timeframes to prepare her case. The Panel finds none of these arguments compelling. All Parties to this proceeding were afforded the same rules and procedures (i.e., no one was able to select an arbitrator and all were subject to a swift timeline to resolve this dispute caused by the nature of the dispute and its timing). Swiss law is clear that when deciding if an arbitration agreement exists there is a high standard to demonstrate that. No one disputes that an agreement to arbitrate exists here. When it comes to deciding whether the specific dispute is within the scope of the arbitration agreement, then Swiss Federal Tribunal jurisprudence makes clear that the standard is significantly lower. The only dispute here raised by the Athlete was whether the Ad Hoc Division or the regular CAS appeals procedures apply. In any event, if this dispute had been brought before the CAS appeals division, the issues raised here would have been resolved not by an arbitration tribunal but by the President of the Appeals Division of CAS, a single individual not appointed by any Party. Finally, any notion of different procedures being followed here that might be more limited than

available in the Appeals Division proceeding are mooted by the fact that the Panel engages below in the same analysis for provisional relief that the CAS Appeals Division President would engage in.

164. In view of the above, the Panel considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter.

VIII. APPLICABLE LAW

165. Under art. 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"*.

166. The Panel notes that the "applicable regulations" in this case are the Russian ADR, in particular Article 9.4 and other sections, and the WADC.

167. On balance, except as noted specifically herein, the Russian ADR, the ISU ADR, and the WADC are in accord on the language and terms relevant to this case.

168. The principle standards that the Panel must apply can be found in Articles 9.4.1 and 9.4.3 of the Russian ADR.

169. Article 9.4.1 requires that a provisional suspension be imposed immediately in the event of an Adverse Analytical Finding for a non-specified substance as follows:

> *"If an Adverse Analytical Finding or Adverse Passport Finding is received (upon completion of verification of an Adverse Passport Finding) which revealed the presence of a Prohibited Substance or the Use of a Prohibited Method not pertaining to a Specified Substance or Specified Method, including Team Sports, Provisional Suspension shall be imposed immediately after reviewing the Adverse Analytical Finding and providing the notification stipulated by Clause 9.2 hereof"*.

170. Article 9.4.3 provides the criteria that must be met for a mandatory provisional suspension to be lifted, as follows:

> *"Mandatory Provisional Suspension may be eliminated if an Athlete provides evidence that the violation was most likely caused by the Use of a Contaminated Product or pertains to a Substance of Abuse Use and proves the right to reduction of the period of Ineligibility pursuant to Clause 12.2.4.1 of the Rules. The decision not to eliminate mandatory Provisional Suspension based on the Athlete's statement on the Use of a Contaminated Product may not be appealed"*.

IX. DISCUSSION

A. Legal framework

171. These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport ("ICAS") on 14 October 2003 (amended on 8 July 2021). They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PILA"). The PILA applies to this arbitration as a result of the express choice of law contained in art. 17 of the Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to art. 7 of the CAS Ad Hoc Rules.

B. Merits

172. The Russian ADR gives special protections to "Protected Persons", defined as:

> *"An Athlete or other natural Person who at the time of the Rules violation: (a) has not reached the age of sixteen years; (b) has not reached the age of eighteen years old and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (c) for reasons other than age has been determined to lack legal capacity under applicable national legislation".*

173. The comment to the definition of Protected Person in the WADC 2021 states the purpose of this definition (appearing at footnote 127):

> *"[Comment to Protected Person: The Code treats Protected Persons differently than other Athletes or Persons in certain circumstances based on the understanding that, below a certain age or intellectual capacity, an Athlete or other Person may not possess the mental capacity to understand and appreciate the prohibitions against conduct contained in the Code]"* (emphasis added).

174. Ms Valieva is clearly a Protected Person under sub-paragraph (a) of the Russian ADR definition; this was not contested.

175. Under the WADC 2021, Protected Persons are mentioned in no less than 10 Articles or Definitions.

176. For example, Protected Persons are mentioned in Article 10.3.1, which provides a reduced period of Ineligibility for a Protected Person, reducing the maximum sanction for a whereabouts failures or evading sample collection from 4 years to 2 years and permitting a reprimand (where non-Protected Persons start their punishment at 2 years).

177. In Article 10.3.3, the violations of tampering or attempted tampering and administration or attempted administration, are referenced and it is noted that a *"violation involving a Protected Person shall be considered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than for Specified Substances, shall result in lifetime Ineligibility for Athlete Support Personnel".*

178. In Article 10.6.3, which governs reduction of sanctions for violations of Articles 2.1 (presence), 2.2 (use or attempted use) and 2.6 (possession) of the WADC, the following standard applies:

> *"10.6.1.3 Protected Persons or Recreational Athletes*
>
> *Where the anti-doping rule violation not involving a Substance of Abuse is committed by a Protected Person or Recreational Athlete, and the Protected Person or Recreational Athlete can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault".*

179. Effectively, this reduces the punishment for Protected Persons for all substances other than Substances of Abuse to the range of reprimand to 2 years, whereas non-Protected Persons may receive that range of sanction if they are able to show No Significant Fault or Negligence involving only Specified Substances (other than a Substance of Abuse).

180. Article 10.14.1 references Protected Persons in the section defining the limitations on involvement of coaches and athlete support personnel during a period of Ineligibility.

181. Article 14.3.7 allows different rules governing public disclosure of anti-doping rules violations involving Protected Persons as follows:

> *"14.3.7 The mandatory Public Disclosure required in 14.3.2 shall not be required where the Athlete or other Person who has been found to have committed an anti-doping rule violation is a Minor, Protected Person or Recreational Athlete. Any optional Public Disclosure in a case involving a Minor, Protected Person or Recreational Athlete shall be proportionate to the facts and circumstances of the case".*

182. Article 20.3.12 requires International Federations:

> *"To vigorously pursue all potential anti-doping rule violations within their authority including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping, to ensure proper enforcement of Consequences, and to conduct an automatic investigation of Athlete Support Personnel in the case of any anti-doping rule violation involving a Protected Person or Athlete Support Person who has provided support to more than one Athlete found to have committed an anti-doping rule violation".*

183. Article 20.5.12 requires National Anti-Doping Organizations:

> *"To conduct an automatic investigation of Athlete Support Personnel within their authority in the case of any anti-doping rule violation by a Protected Person and to conduct an automatic investigation of any Athlete Support Person who has provided support to more than one Athlete found to have committed an anti-doping rule violation".*

184. Similarly, when assessing Fault, under the definition of Fault for Protected Persons:

> *"special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk".*

185. In the definition of No Fault or Negligence, Protected Persons also face a lower standard of proof:

> *"Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system".*

186. The identical exception for Protected Persons applies in the definition of No Significant Fault or Negligence.

187. It is clear by these mentions that the WADC 2021 intends to give special treatment to Protected Persons like the Athlete here.

188. In this context we must turn to the Russian ADR provisions governing Provisional Suspensions.

189. Article 9.4.1 requires that a Provisional Suspension be imposed immediately in the event of an Adverse Analytical Finding for a non-specified substance as follows:

> *"If an Adverse Analytical Finding or Adverse Passport Finding is received (upon completion of verification of an Adverse Passport Finding) which revealed the presence of a Prohibited Substance or the Use of a Prohibited Method not pertaining to a Specified Substance or Specified Method, including Team Sports, Provisional Suspension shall be imposed immediately after reviewing the Adverse Analytical Finding and providing the notification stipulated by Clause 9.2 hereof".*

190. Article 9.4.3 provides the criteria that must be met for a mandatory Provisional Suspension to be lifted, as follows:

> *"Mandatory Provisional Suspension may be eliminated if an Athlete provides evidence that the violation was most likely caused by the Use of a Contaminated Product or pertains to a Substance of Abuse Use and proves the right to reduction of the period of Ineligibility pursuant to Clause 12.2.4.1 of the Rules. The decision not to eliminate mandatory Provisional Suspension based on the Athlete's statement on the Use of a Contaminated Product may not be appealed".*

191. Curiously, the English translation of the Russian ADR use the phrase "most likely" in Article 9.4.3, while the equivalent WADC 2021 Article does not contain the word "most" before "likely". "Most likely" is a different and higher standard, in English, than "likely". This might suggest that the Russian ADR set a higher standard than the WADC on this point. In the absence of any particular submission from the Parties in this regard, the Panel is going to assume that this is just a fault of translation from the Russian rather than that the Russian ADR intended to set a higher standard than the WADC on this point.

192. WADA and the ISU argue that as trimetazidine is not a Substance of Abuse, the only basis for lifting the mandatory Provisional Suspension is if the Athlete demonstrates that the violation is "likely" to have involved a Contaminated Product. A Contaminated Product is defined in the Russian ADR Definitions as a *"product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search"*.

193. The RUSADA Anti-Doping Rules and the WADC are silent with respect to Provisional Suspensions imposed on Protected Persons, while the several above-specified provisions provide for different standards of evidence and lower sanctions in the case of Protected Persons.

194. The WADC 2021 revised the Provisional Suspension rules. Under WADC 2021 Article 7.4.1 (equivalent to Russian ADR Article 9.4.1), mandatory Provisional Suspensions only apply to adverse analytical findings for prohibited substances other than Specified Substances. Those testing positive for Specified Substances are subject to optional Provisional Suspensions.

195. Because she is a Protected Person, and this is highly relevant in this particular case, Ms Valieva is potentially subject to a minimum possible sanction of a public reprimand in the event she could establish No Significant Fault or Negligence. The WADC does not provide an exemption to a mandatory Provisional Suspension for a non-specified substance used by a Protected Person even though the ultimate sanction range for the Protected Person is the same as for other categories of athletes who can avoid a mandatory Provisional Suspension. Put differently, as a Protected Person, Ms Valieva is subject to the same ultimate sanction as other athletes who avoid a mandatory Provisional Suspension. But only Protected Persons can potentially receive a public reprimand and no period of ineligibility and yet be subject to a mandatory Provisional Suspension preventing them from competing for months while their case is being handled. This different and harsher treatment for Protected Persons is inconsistent with the oft-expressed intent of the Code drafters to make the Code apply more leniently and flexibly to Protected Persons in light of their age and inexperience, and their diminished responsibility for rule violations.

196. Exempting older athletes from mandatory Provisional Suspensions in most instances in which they might ultimately be able to establish basis for a short sanction or reprimand but not exempting younger, legally incapable, and immature Protected Persons who might be entitled to a short sanction or reprimand appears clearly to be an unintended gap in the Code.

197. Evidence was presented at the hearing that the WADC 2021 drafting committee had apparently not considered the issue of Protected Persons in the context of Provisional Suspensions and whether the standards should vary in the case of Provisional Suspensions involving Protected Persons. There was no contrary evidence presented and the veracity of this statement was not disputed at the hearing.

198. You cannot consider Articles 9.4.1 and 9.4.3 of the Russian ADR in a vacuum or as standalone provisions. They must be considered in the context of the rest of the Russian ADR to ensure their consistent application.

199. Here, it was obvious to the Panel that under the relevant provisions of the WADC 2021 dealing with the notion of Fault, it is not just possible but likely that Protected Persons will receive anti-doping sanctions at the level of a reprimand or at the bottom end (a few months) of the 0 to 2 years possible, principally because of their lack of legal capacity and their youth and immaturity. *See generally* WADC 2021 Definitions: Fault, No Significant Fault or Negligence, and No Fault or Negligence; WADC 2021 Articles 10.3.1, 10.6.3.1. The Panel does not make any findings in this regard; that is to be done by the usual anti-doping results management process given the very narrow remit of this Panel and what it was called upon to consider. Having said that, it is clear that even if that process finds a doping rule violation, the ability to show intention or fault of a minor athlete such as this one might be difficult, and, lacking that intention or fault, the sanction is likely to be on the low end of the range. Strict application of the rules as written for Provisional Suspensions would almost certainly in every case involving a Protected Minor result in a Provisional Suspension longer than the likely period of actual suspension. This is not satisfactory from a legal point of view.

200. As a result, it appears to the Panel there is a *lacuna*, or a gap, in the Russian ADR, and indeed the WADC 2021. When CAS panels find a *lacuna* in the WADC, this has been the basis for a CAS panel to find a gap filling construct that would ameliorate an overly harsh or inconsistent outcome: *"[W]hen there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel … applying the overarching principle of justice and proportionality on which all systems of law, and the* [WADC] *itself, is based"* (CAS 2006/A/1025).

201. This is an exercise in interpretation, not in rewriting rules or making policies that are better made by sporting bodies exercising proper governance. The Panel wishes to emphasize that it does not see itself as a policymaker or rulemaker, but it is properly called upon, as are courts around the world, to interpret rules and how they work. *See, e.g.,* CAS OG 22/006, paras. 7.16-18. Here, the failure of the anti-doping authorities to reconcile the special rules they have created for Protected Persons and rules they have created for athletes who are not Protected Persons requires the involvement of this Panel.

202. Accordingly, the Panel determines that in cases involving Protected Persons, their Provisional Suspensions should be evaluated as optional Provisional Suspensions under WADC 2021 Article 7.4.2 and its progeny. The Panel determines that Ms Valieva was entitled to benefit from being subject to an optional Provisional Suspension as a Protected Person and that, under the facts and circumstances, the option not to impose a Provisional Suspension should have been exercised so that she would not be prevented to compete in the OWG 2022.

203. Putting aside the analysis above, and as an alternative basis for the Panel's decision, the Panel considers that in considering the lifting of the Provisional Suspension for this Athlete, under the narrow facts of this case and the situation in which this Athlete finds herself through no fault of her own, and where the Athlete could have filed a request for provisional measures with the Appeals Division of CAS had she not been put into the current CAS Ad Hoc Division proceeding by the Applications of the IOC, WADA, and the ISU, the well-accepted CAS and

related standards used for assessing requests for provisional relief are appropriate to consider and yield the same outcome.

204. Article 37 of the CAS Code as well as Article 14 of the CAS Ad Hoc Rules permit provisional relief to be awarded by CAS panels upon a proper showing.

205. In accordance with regular CAS jurisprudence, and as a general rule, when deciding whether provisional measures may be granted, it is necessary to consider whether the measure is necessary to protect the applicant from irreparable harm, the likelihood of the applicant succeeding in the substantive appeal, and whether the interests of the applicant outweigh those of the Respondent. *See* CAS 2003/O/486; Orders of CAS 2013/A/3199; CAS 2010/A/2071; CAS 2001/A/329; and CAS 2001/A/324. These criteria are cumulative. *See* Orders of CAS 2013/A/3199; CAS 2010/A/2071; and CAS 2007/A/1403. *Accord*, PATOCCHI P, Provisional Measures in International Arbitration, in BERNASCONI M. (ed.), International Sports Law and Jurisprudence of the CAS, Bern 2014, pp. 68-72; BENZ/STERNHEIMER, Expedited Procedures before the Court of Arbitration for Sport, CAS Bulletin 2015/1, at 6-11. These criteria are clearly enumerated in Article R37(5) of the CAS Code.

206. In evaluating whether the criteria are satisfied, the Panel also has considered the length of time it took for the laboratory to submit its report of an AAF involving the Athlete, the timing of that relative to the conduct of the Women's Single Skating event at the OWG 2022, the difficulty to be faced in the Athlete not being able in the current situation, right in the middle of the OWG 2022, to muster proof to support her defense of the ADRV being asserted against her (including having her B-Sample analysed), the relatively low level of the prohibited substance found in her sample, the fact that she has tested negative in multiple tests before and after the test in question (on 30 October 2021; on 13 January 2022; and on 7 February 2022 on the occasion of the Team Event (figure skating) at the OWG 2022), the case she has attempted to muster on contamination whether in a product or through domestic contamination, and the likely low level of sanction she will face if found to have committed an ADRV.

207. In accordance with CAS jurisprudence, when deciding whether to stay the execution of the decision being appealed, the CAS considers whether such a stay is necessary to protect the applicant from substantial damage that would be impossible or very difficult to remedy at a later stage. *See* CAS 2013/A/3199, *quoting* CAS 2007/A/1370-1376 (stating *"The Appellant must demonstrate that the requested measures are necessary in order to protect [her] position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage"*).

208. While, according to CAS case law (CAS 2008/A/1569), it is not in itself sufficient that an athlete is prevented from competing in sports events to justify a stay in itself, CAS has consistently recognized that, given the finite and brief career of most athletes, a suspension (subsequently found to be unjustified) can cause irreparable harm (*see* Preliminary Decision in CAS 2008/A/1453, para. 7.1), especially when it bars the athlete from participating in a major sports event. The doctrine of conservatory measures under Swiss law provides that *"the conservatory*

measure shall avoid a damage which shall be difficult to remedy if it was not ordered immediately" (HOHL F., Procedure Civile, Tome II, Bern 2002, p. 234). *See* CAS 2011/A/2615.

209. The Panel finds that the likelihood of irreparable harm is present here.

210. In this case, first through no fault of hers, and without any allegation of improper conduct of anyone, the Athlete finds herself at the Olympic Winter Games being put on notice of an alleged ADRV from a sample taken 44 days prior. The Panel notes, putting this delay into context, that she was tested on 13 January 2022 and 7 February 2022 and those results had been reported by the time of the RUSADA hearing on 9 February 2022.

211. WADA argued that the International Standard for Laboratories merely recommends but does not compel WADA-accredited labs to process samples within 20 days and that here the 40 days it took to inform Ms Valieva is well within the range of what WADA usually or often sees from laboratories processing anti-doping samples. The Panel finds this submission to not be compelling. On the contrary, it is rather worrying to hear such a submission when Athletes are held to a high standard in meeting their anti-doping obligations and at the same time, the anti-doping authorities are subject to mere recommendations on time deadlines that are designed to protect athletes from late- or inconveniently-arising claims. The flexibility of the recommendations and guidelines applicable to WADA-accredited labs contrasts with the stringency of the rules on Provisional Suspensions. Although all athletes' samples are anonymous, it should be possible for anti-doping laboratories and authorities to handle anti-doping tests in a swift manner when the samples are collected at significant pre-events that may constitute selection events for the Olympic Games, such as the Russian National Championships in figure skating.

212. Nor does the Panel find compelling the fact that the Stockholm laboratory here blamed the processing delay on staffing problems caused by the pandemic. None of this is the fault of the Athlete and it has put her in a remarkably difficult position where she faces a lifetime of work being taken from her within days of the biggest event of her short career. The Stockholm laboratory's delay is the factor that has thrust the difficult timing issues on the Athlete, and the awkward event operation and management, and sport integrity issues, for the Applicants in this case, and more generally for all parties involved in these procedures.

213. Secondly, the imminent approach, just days after the notification of the ADRV, of the OWG 2022 Women's Single Skating event is a significant factor. If the Athlete was to remain ineligible to compete, that would give rise, on any reasonable objective view, to irreparable harm, *per se*. Competing in these OWG 2022 is a unique experience, and the chance to win a medal and all that comes with that glory, is rare, of limited opportunity, and uncertain of repeating or being on offer again.

214. CAS jurisprudence also indicates that *"the Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled". See* CAS 2010/A/2113; CAS 2011/A/2615; CAS 2012/A/2943.

215. The criterion of likelihood of success cannot be evaluated in depth after such a short procedure but it suffices to say at this stage that the Athlete has more than nugatory arguments at her disposal regarding the length of her suspension or whether one will even be imposed. Whether these arguments will prevail to the extent suggested by the Athlete, or less, can only be fully addressed in the anti-doping merits hearing(s) to which she is entitled, and need not be addressed at this interlocutory stage of the proceedings. However, the Panel finds that they are sufficiently plausible to consider that the possibility that the Provisional Suspension be lifted this case cannot be discarded at this stage, which is sufficient to satisfy the second criterion.

216. As indicated in the above-referenced decisions as well as others, the applicant would need to demonstrate that the harm or inconvenience it would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures.

217. If the anti-doping results management process was to find in the full hearing that a sanction of a period of suspension should issue, then the Athlete will suffer the bite of that suspension. By contrast, if the Provisional Suspension was to be put in place, but the results management process was to find after the merits hearing that the suspension should be lifted or materially reduced, then the Athlete will have lost the chance of competing in the Olympic Games without any possibility of recompense. If the Athlete competes and wins a medal, and she is later found to have committed an ADRV that would have prevented her from competing, the Athlete's placement can be vacated and her medal returned (though the Panel has taken note that the IOC has subsequent to the hearing here issued a statement to the effect that if the Athlete finishes in the top 3 medals for Women's Single Skating will be issued after her doping case is resolved); the chance to compete in the Games is, however, fleeting and incapable of replacement with anything else. Therefore, the Panel holds that the balance of interests tips decisively in favour of the Athlete, again because she is a Protected Person. Finally, the Panel is persuaded that in the face of irreparable harm to the Athlete upon issuance of a Provisional Suspension (eventually possibly being found to be unjustified), there is no founded and equally tangible irreparable harm in case of lifting of the Provisional Suspension, neither for the Applicants nor for the other competitors.

218. Accordingly, for all the foregoing reasons, the Panel finds that the Provisional Suspension should remain lifted.

219. Having made the decisions above, it is unnecessary for the Panel to assess the proportionality arguments submitted by the Athlete and the ROC.

220. It is unfortunate that this episode occurred to mar this Athlete's, and other Athletes', Olympic Winter Games experience. This has been the result of the relevant anti-doping bodies to ensure timely analysis of pre-Games samples, and failing to ensure that pending cases are resolved before the Olympic Winter Games commence. Had that all been accomplished on time and in conformity with the time limits recommended by WADA in its International Standards for

Laboratories, then a decision on the merits of Ms Valieva's case and her status could have been made well before the Games started, and before her competition experience and that of other athletes was affected adversely. Put simply, athletes should not be subject to the risk of serious harm occasioned by anti-doping authorities' failure to function effectively at a high level of performance and in a manner designed to protect the integrity of the operation of the Games. As put well by an early CAS panel with esteemed arbitrators:

> *"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable".* CAS 94/129, para. 34.

221. This Panel is not concerned that the limited facts that ground this decision open the door to young athletes competing in the Olympic Games or other events simply because they are Protected Persons. This decision is based on the facts presented to the Panel, the instigating fact of which was untenable delay by the Stockholm laboratory caused by reasons not attributable to the Athlete and the anchor of which is that the Athlete is a Protected Person. This case was not about the underlying alleged anti-doping rule violation and the Panel takes no position on that; Ms Valieva will have the opportunity to challenge that evidence in other proceedings unrelated to this one, as required by the relevant anti-doping rules and regulations. Furthermore, the Panel is mindful the subject of the present decision is not whether or not the Athlete, with the status of a Protected Person, committed an ADRV, but whether or not the Provisional Suspension was to be reinstated. In the light of the circumstances above, the Panel believes that this decision is the one that best protects the interest of sport without harming athletes or vindicating the collectively well-accepted goal of "Clean Sport".

X. COSTS

222. According to Article 22 para. 1 of the CAS Ad Hoc Rules, the services of the CAS ad hoc Division *"are free of charge"*.

223. According to Article 22 para. 2 of the CAS Ad Hoc Rules, parties to CAS ad hoc proceedings *"shall pay their own costs of legal representation, experts, witnesses and interpreters"*.

224. The Panel notes that the Athlete submitted the following request: *"*(3) *Order the International Olympic Committee, the World Anti-Doping Agency and the International Skating Union to pay the costs of the arbitration (if any) as well as Ms Kamila Valieva's legal fees and expenses"*.

225. Based on the provision of Article 22 of the CAS AD Hoc Rules, the Athletes' request is therefore rejected.

XI. CONCLUSION

226. In view of the above considerations, the Applications filed by IOC, WADA and ISU against the Decision of the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency (RUSADA) on 9 February 2022, N. 40/222 are rejected.

DECISION

The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The Ad Hoc Division of the Court of Arbitration for Sport has jurisdiction to determine the Applications filed by the International Olympic Committee (IOC), World Anti-Doping Agency (WADA) and International Skating Union (ISU).

2. The Applications filed by the International Olympic Committee (IOC), World Anti-Doping Agency (WADA) and International Skating Union (ISU) are dismissed.